STATE OF MICHIGAN

COURT OF APPEALS

CH HOLDING COMPANY,

Plaintiff-Appellee,

and

ALAN ACKERMAN,

Plaintiff/Counter-Defendant-Appellee,

v

BRUCE MILLER and CH BRAND PARKING ASSOCIATES,

Defendants-Counter-Plaintiffs,

and

MILLER PARKING COMPANY, L.L.C.,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 20, 2011

No. 293686
Oakland Circuit Court
LC No. 2004-062160-CZ

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this partnership dispute, defendant Miller Parking Company, L.L.C. ("MPC"), appeals as of right from a judgment following a jury trial. The judgment awarded $3,101,835.83 to plaintiff CH Holding Company ("CH Holding") and $625,784.71 to plaintiff Alan Ackerman on

plaintiffs' claims for tortious interference with a business relationship or expectancy.[1] We affirm.

Plaintiff CH Holding is a limited partnership consisting of a general partner and limited partners. Plaintiff Ackerman is one of the limited partners. Defendant Miller is the general partner of CH Holding. Miller is also the sole member and chairman of MPC, a parking management company. In addition, CH Holding is the managing partner of CH Brand Parking Associates ("CH/Brand"), which was formed for the purpose of owning and operating a parking facility on property near the Greektown Casino in Detroit, with the expectation that the property could be sold for an appreciated value. MPC had an agreement to operate the parking lot for CH Holding. The CH Holding partnership agreement required Miller to use his best efforts to carry out and implement the purposes of the partnership. Miller also had a separate agreement with Ackerman in which Miller agreed to consult with Ackerman regarding the sale of the parking lot.

Plaintiffs filed this action after two offers to purchase the parking lot failed to result in a timely sale. Plaintiffs claimed that Miller's handling of CH Holding's interest in the parking lot violated the partnership agreement and that he breached his fiduciary duties. Plaintiffs also claimed that MPC interfered in a possible sale of the parking lot and was liable for tortious interference with plaintiffs' business relationships and expectancies.

The trial court denied defendants' motions for summary disposition. The jury found that Miller breached his fiduciary duties and also breached the partnership agreement. It awarded damages to Ackerman and to CH Holding against Miller for each of those claims. The jury also found that MPC was liable for tortious interference with a business relationship or expectancy and again awarded damages to Ackerman and to CH Holding.[2] Defendants' post-judgment motion for a new trial, judgment notwithstanding the verdict, or remittitur was denied. This appeal followed.

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[1] The judgment also awards these same amounts to plaintiffs against defendant Bruce Miller on plaintiffs' separate claims against Miller for breach of fiduciary duty and breach of a partnership agreement. Although the claim of appeal was filed by both Miller and MPC, after the parties filed their briefs on appeal, they stipulated to dismiss Miller's claim of appeal, with prejudice, leaving MPC as the only appellant to this appeal. To the extent that defendants' brief on appeal raises issues that relate only to plaintiffs' breach of fiduciary duty and breach of the partnership agreement claims against Miller, they need not be considered in light of Miller's dismissal from this appeal. MPC, as the only remaining appellant, lacks standing to assert any issues that affect Miller. See *Manuel v Gill*, 481 Mich 637, 644; 753 NW2d 48 (2008); *Kieta v Thomas M Cooley Law School*, 290 Mich App 144, 147; 799 NW2d 579 (2010). Thus, this appeal is limited to those issues that implicate MPC's liability for tortious interference with a business relationship or expectancy.

[2] The trial court's judgment also awarded plaintiffs statutory interest.

I. SUMMARY DISPOSITION

MPC first challenges the trial court's denial of its motions for summary disposition. This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp,* 456 Mich 331, 337; 572 NW2d 201 (1998). MPC filed two motions for summary disposition, both under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson,* 212 Mich App 45, 48; 536 NW2d 834 (1995).

MPC argues that it was entitled to summary disposition because there was no evidence that it was unjustly enriched when it received three percent of the rental proceeds from a lease of the parking lot, given that it was authorized to receive a fee of five percent of gross revenues from the parking lot operation under the terms of the CH/Brand partnership agreement. We note that this argument appears to relate to plaintiffs' separate claim against MPC for unjust enrichment. However, that claim was dismissed with prejudice and was never submitted to the jury. Because MPC was not found liable for unjust enrichment, any issue relating to that theory does not provide a basis for relief. To the extent that MPC's argument substantively relates to the only count for which it was found liable, tortious interference with a business relationship or expectancy, we find no error.

A claim for tortious interference with a business relationship or expectancy requires proof of the following elements:

> (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted. [*PT Today, Inc v Comm'r of the Office of Fin & Ins Servs,* 270 Mich App 110, 148; 715 NW2d 398 (2006).]

Moreover,

> [i]n order to establish tortious interference with a contract or business relationship, plaintiffs must establish that the interference was improper. *Patillo v Equitable Life Assurance Society of the United States,* 199 Mich App 450, 457; 502 NW2d 696 (1992). In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy. *Winiemko v Valenti,* 203 Mich App 411, 418 n 3; 513 NW2d 181 (1994) (citations omitted); *Feldman v Green,* 138 Mich App 360, 369; 360 NW2d 881 (1984). The "improper" interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice

> and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship. *Id*. [*Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003).]

MPC argues that it was entitled to summary disposition because the evidence showed that it only sought three percent of the rental proceeds paid by Greektown Casino to CH/Brand, and the CH/Brand partnership agreement allowed MPC to receive five percent of the gross revenues from parking lot operations. However, the evidence showed that there were also other charges by MPC for its services. The trial court did not err in finding that there was an issue of fact whether MPC was entitled to the three-percent payments in addition to its other charges.

MPC also argues that it was entitled to judgment in its favor with regard to plaintiffs' claim that MPC interfered with plaintiffs' business interests through the inclusion of clauses in proposed leases or sale agreements that required that MPC continue to operate the parking lot. Plaintiffs' theory was that Bruce Miller inserted the clauses into any offers or agreements for his own personal financial benefit through MPC. MPC argues that it was entitled to summary disposition with respect to this issue because the "coordination clause" did not affect the amount of rent paid by Greektown Casino, the partnership agreement did not prohibit it, and CH/Brand, CH Holding, and Ackerman were not engaged in the parking management business. We disagree. MPC's arguments ignore the basis for plaintiffs' claim. Plaintiffs' theory was that Bruce Miller and MPC were more concerned with securing parking management deals that were financially beneficial to Miller and MPC than with maximizing plaintiffs' investments. Plaintiffs did not argue that MPC directly diverted business away from plaintiffs, but rather that plaintiffs were harmed when deals to sell the property were not pursued and conditions were imposed that were intended to benefit only MPC. The fact that plaintiffs were not in the business of managing parking lots was not material to their tortious interference claim and the trial court properly denied summary disposition for MPC on this ground. Plaintiffs had argued that Bruce Miller's self-dealing and breaches of fiduciary duty through MPC were intended to directly benefit MPC, to plaintiffs' detriment in closing a deal for the sale of the property. MPC has not shown that the trial court erred in denying summary disposition on this ground.

Although MPC also argues that there was no evidence to support plaintiffs' claim involving the payment of excessive management fees to MPC, its discussion of that issue focuses only on commissions due James Miller, Bruce Miller's son, which has no bearing on the sole claim against MPC. MPC does not further address this issue in its brief or explain the substance of its argument. Accordingly, MPC has abandoned any argument regarding management fees. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).

MPC also challenges the trial court's decision denying its second motion for summary disposition, with regard to whether plaintiffs showed that MPC interfered with their business expectancies related to a possible sale of the property to Axial Group, L.L.C. ("Axial"), on behalf of Wayne County. MPC argues that it was entitled to judgment in its favor because Axial never made an offer to purchase, and only obtained an option to purchase for Wayne County. The trial court did not err in denying summary disposition on this ground. Plaintiffs produced a letter from Axial's broker that expressed an intent to go forward with the sale. This established a question of fact concerning the existence of an offer. Moreover, it was plaintiffs' theory that the

terms and conditions imposed for any sale, including the requirement for a management contract with MPC, were fatal to a successful contract to sell the property. The trial court did not err in finding that there was a genuine issue of material fact with respect to whether the transactions with either Axial or Greektown Casino would have closed but for those conditions. Therefore, the trial court did not err in denying the second motion for summary disposition.

II. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

MPC next argues that the trial court erred by denying its motions for a directed verdict and JNOV. A trial court's decision on a motion for a directed verdict or JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). A motion for JNOV or a directed verdict requires this Court to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. The motion should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Id*. If reasonable minds could differ regarding the evidence, the issue is for the jury and a directed verdict or JNOV is improper. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

MPC essentially repeats its earlier argument regarding the coordination clauses. Even if MPC did not do anything to affect the parking lot business, there was evidence that the insertion of the coordination clauses, which benefited MPC, affected the consummation of a deal to sell the property. Thus, MPC's role with regard to the coordination clauses interfered with plaintiffs' business expectancy in selling the parking lot for the highest profit. Similarly, it is immaterial that MPC never actually entered into a management agreement with any of the potential buyers. Again, the evidence showed that the insertion of the coordination clauses in the proposed sales agreements affected the marketability of the property, thereby affecting plaintiffs' financial interests. MPC has not shown that the trial court erred in denying its motions for a directed verdict or JNOV on this ground.

MPC also argues that it was entitled to a directed verdict or JNOV regarding plaintiffs' claims relating to the improper charging of expenses to CH/Brand. MPC argues that there was no evidence that this was improper under the partnership agreement and, accordingly, there was no unjust enrichment. As previously indicated, the trial court dismissed the unjust enrichment count with prejudice. Accordingly, MPC is not entitled to relief with respect to this issue. Moreover, as previously discussed, there was a question of fact regarding what fees or expenses were properly allowed under the terms of the partnership agreement.

MPC also argues that plaintiffs' tortious interference claim was barred by the statute of limitations. The parties agree that the applicable limitations period is three years. See MCL 600.5805(10), *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 253; 673 NW2d 805 (2003); *James v Logee*, 150 Mich App 35, 37-38; 388 NW2d 294 (1986). Plaintiffs filed their original complaint on November 4, 2004. MPC argues that plaintiffs' claims involve events that occurred between April 1997 and January 2001 and, therefore, the complaint was not timely filed. Plaintiffs were permitted to file an amended complaint in which they alleged the

action was timely filed because of fraudulent concealment by defendants. The trial court found that there was a question of fact concerning whether defendants fraudulently concealed the existence of a claim, so the issue should be decided by the jury.[3]

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In order for fraudulent concealment to toll the statute of limitations, the acts relied on must be fraudulent and of an affirmative character. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004). "The plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. Mere silence is insufficient." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). The plaintiff is also charged with the discovery of facts that, with the exercise of reasonable diligence, he ought to have discovered. *Shember v Univ of Mich Med Ctr*, 280 Mich App 309, 316; 760 NW2d 699 (2008). "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Sills*, 220 Mich App at 310.

In *Lemson v Gen Motors Corp*, 66 Mich App 94, 97; 238 NW2d 414 (1975), this Court, quoting *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932), defined fraudulent concealment as follows:

> "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent."

Plaintiffs alleged in their complaint that defendants concealed information from them. Further, Ackerman's testimony indicated that Bruce Miller prevented him from learning details about his investment in CH Holding, which included transactions involving MPC. Although Ackerman was provided with some information and documents related to these transactions, the trial court properly determined that there was a question of fact for the jury whether there was fraudulent concealment. Bruce Miller admitted that he had a separate agreement to consult with

[3] The trial court correctly noted that the continuing wrongs doctrine does not save plaintiffs' claims because that tolling exception has been abrogated. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285-288; 769 NW2d 234 (2009).

Ackerman in connection with the sale of the property and that he simply stopped providing information to Ackerman.

MPC has not shown that it was entitled to judgment in its favor based on the statute of limitations.

III. REMITTITUR

MPC lastly argues that the trial court erred in denying its motion for remittitur. This Court reviews a trial court's decision on remittitur for an abuse of discretion. *Campbell v Dep't of Human Servs,* 286 Mich App 230, 243; 780 NW2d 586 (2009). "An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes." *Heaton v Benton Const Co,* 286 Mich App 528, 538; 780 NW2d 618 (2009).

MCR 2.611(E)(1)provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

In reviewing a motion for remittitur, a court must be careful not to usurp the jury's authority to decide what amount is necessary to compensate the plaintiff. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009). In *Freed,* this Court explained:

> Thus, "appellate review of jury verdicts must be based on *objective* factors and firmly grounded in the record." Our Supreme Court has indicated that the factors that should be considered by this Court are: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. [*Id.* (citation omitted).]

This Court will defer to the trial judge's decision because he is in the best position to determine whether the jury's verdict was motivated by impermissible factors and he is also able to observe the witnesses and the jury's reactions to the witnesses and evidence. *Id*. at 335.

"The power of remittitur should be exercised with restraint." *Taylor v Kent Radiology, PC,* 286 Mich App 490, 522; 780 NW2d 900 (2009). In *Heaton,* 286 Mich App at 538-539, this Court explained:

> Analysis of this issue must start with the principle that the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square, Inc,* 465 Mich 29, 35; 632 NW2d 912 (2001). Moreover, a verdict should not be set aside merely because the method the jury used to

> compute damages cannot be determined. *Diamond* [*v Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005)], *supra* at 694. This Court must view the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). "A trial court's order of remittitur is governed by MCR 2.611(E)(1)." *Palenkas* [*v Beaumont Hosp*, 432 Mich 527; 443 NW2d 354 (1989)], *supra* at 531. Accordingly, remittitur is justified only "if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.'" *Id*., quoting MCR 2.611(E)(1).

MPC argues that it was entitled to remittitur because Ackerman was not individually entitled to recover damages because any injury occurred only to the partnership. We agree that the trial court properly rejected this argument as a basis for granting remittitur. Remittitur is concerned only with the amount of damages awarded by a jury, not whether a party has a right to damages. *Heaton*, 286 Mich App at 538-539. MPC's argument is not based on a disagreement with the *amount* of damages awarded to plaintiffs, but rather concerns plaintiffs' right to recover any damages. Therefore, MPC has not shown that it was entitled to remittitur, particularly considering that it has not identified any objective criteria that would support a reduction of the amount of damages awarded by the jury.

MPC's remaining arguments also are with merit. MPC argues that any award related to the failure to sell the parking lot to Greektown Casino or Axial is not supported based on lack of causation or the fact of damages. This is the same argument that MPC presented in its motions for summary disposition, a directed verdict, and JNOV. This argument has nothing to do with the amount of the jury's award, but whether plaintiffs properly established liability in the first instance. MPC's argument that plaintiffs were not entitled to damages because of the three percent fee paid to MPC similarly relates to the legal basis for this claim, not the amount of damages awarded. Accordingly, MPC has not shown that the trial court erred in denying its motion for remittitur.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell